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10/518,356	12/17/2004	Tokutomi Watanabe	47233-0048	8100

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EXAMINER	
STULII, VERA	

ART UNIT	PAPER NUMBER
1794	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/518,356	WATANABE ET AL.	
	Examiner	Art Unit	
	VERA STULII	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 April 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *13-35* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *13-35* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 13-35 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

NOTE: The claims are generally narrative and indefinite, failing to conform with current U.S. practice. They appear to be a literal translation into English from a foreign document and are replete with grammatical and idiomatic errors.

Claim 13 is indefinite for the recitation of the phrase "superior foam-holding property". The term "superior" in claim 13 is a relative term which renders the claim indefinite. The term "superior" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

Claims 13, 23 and 27 are also rendered indefinite for the recitation of the phrase "wherein the tea leaf extract is included in the drink in an amount of 0.01% to 3% by weight per volume as calculated by the soluble solid of the tea leaf extract". It is not clear how the amount of tea extract is being calculated. It is not clear whether percentage of tea extract is being compared to itself, or there is some other interpretation.

Claim 30 is indefinite for the recitation of the phrases "finer effervescence" and "better texture". The terms "finer" and "better" in claim 30 are relative terms which render the claim indefinite. The terms "finer" and "better" are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 13-16, 18-30 and 32-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Liu (CN 1237624).

In regard to claims 13, 23 and 26, Liu discloses a carbon dioxide containing beverage that is formed from tea (tea extract), wine, liquor, fruit juice, white granulated sugar, sweetening agent, carbon dioxide, foaming agent, thickening agent, etc. (Abstract). Regarding tea extract recitations, it is noted that tea as a beverage is a tea extract, since tea leaves do not dissolve in water during brewing. Tea flavor is extracted during the brewing of tea.

In regard to claims 13, 23 and 27, Liu do not specifically disclose amounts of extract as recited. One of ordinary skill in the art would have been motivated to vary amount of tea extract depending on a desired color, taste, aroma desired. One of ordinary skill in the art would have been motivated to do so, since this was a common practice in the art. One of ordinary skill would also have been motivated to vary amount

of tea extract in the beverage depending on personal preferences of a consumer. One of ordinary skill would also have been motivated to vary amount of tea extract in the beverage depending on the initial concentration of tea extract.

Regarding claims 18 and 32, Liu do not disclose particular type of tea. Given the fact that both green tea and black tea types were well known in the art to be used for tea beverages preparation, one of ordinary skill in the art would have been motivated to choose a particular type of tea based on a personal preferences of a consumer, such as color, flavor, taste, etc. Particular choice of tea would not have involved an inventive step.

Also in regard to claim 19, 24-25 and 28-29, Liu do not specifically disclose particular internal pressure of carbon dioxide. However, one of ordinary skill in the art would have been motivated to vary amount of carbon dioxide incorporated depending on a desired mouthfeel, fizz and flavor.

In regard to claims 20-22 and 33-35, Liu discloses wine and fruit juice. Liu do not particularly disclose alcohol content of the resulting beverage. However, one of ordinary skill in the art would have been motivated to vary amount of alcohol in the beverage due to the consumer preference of alcohol product, and also based upon the concentration of the final preparation, materials, etc.

In regard to claims 14-16 and 30, that recite various foam-holding properties, it is noted that although the references do not specifically disclose every possible quantification or characteristic of its product, such as foam-holding properties, this characteristic would have been expected to be in the claimed range absent any clear

and convincing evidence and/or arguments to the contrary. The reference discloses the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would recognize that the foam-holding properties, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable reading of the teachings of the reference has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

Claim 17 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Liu (CN 1237624) in view of Gong Yungao (CN 1285153).

Liu is taken as cited above. Liu discloses that tea beverage is a refreshing drink having that prevents fatigue and regulates appetite.

Liu do not disclose use of hop extract.

Gong Yungao disclose tea beverage "with medical health care" action containing hops and tea leaf extract. Gong Yungao discloses that the finished product prevents hypertension, regulates metabolism, and has a good taste.

Since Liu discloses tea beverage with beneficial properties for human health, and since Gong Yungao discloses tea beverage in combination with hops that prevents hypertension, regulates metabolism, and has a good taste, one of ordinary skill in the art would have been motivated to modify disclosure of Liu and to include hop extract as an ingredients for the benefits taught by Gong Yungao. One of ordinary skill in the art

would have been motivated to do so, since both tea and hops are known to impart bitter flavor to beverages. One of ordinary skill in the art would also have been motivated to do so, since hops were well known in the art to be used in preparation of effervescent beverages.

Claims 13-16, 18-30 and 32-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Suzuki et al (JP 04356160).

In regard to claims 13, 23 and 26, Suzuki et al disclose adding emulsifier and ethyl alcohol to an aqueous extract of tea (Abstract). Suzuki et al also disclose that the resultant composition "is forced to be mixed with air and foamed" by using homogenizer. Suzuki et al disclose "a composition excellent in foamability, foam adhesion, uniformity, etc." (Abstract). Regarding carbon dioxide recitations, it is noted that air contains carbon dioxide, and forcing composition to be mixed with air, is the same as forcing composition to be mixed with carbon dioxide. Regarding tea extract recitations, it is noted that tea as a beverage is a tea extract, since tea leaves do not dissolve in water during brewing. Tea flavor is extracted during the brewing of tea.

In regard to claims 13, 23 and 27, Suzuki et al do not specifically disclose amounts of extract as recited. One of ordinary skill in the art would have been motivated to vary amount of tea extract depending on a desired color, taste, aroma desired. One of ordinary skill in the art would have been motivated to do so, since this was a common practice in the art. One of ordinary skill would also have been motivated to vary amount of tea extract in the beverage depending on personal preferences of a consumer. One

of ordinary skill would also have been motivated to vary amount of tea extract in the beverage depending on the initial concentration of tea extract.

Regarding claims 18 and 32, Suzuki et al do not disclose particular type of tea. Given the fact that both green tea and black tea types were well known in the art to be used for tea beverages preparation, one of ordinary skill in the art would have been motivated to choose a particular type of tea based on a personal preferences of a consumer, such as color, flavor, taste, etc. Particular choice of tea would not have involved an inventive step.

Also in regard to claim 19, 24-25 and 28-29, Suzuki et al do not specifically disclose particular internal pressure of carbon dioxide. However, one of ordinary skill in the art would have been motivated to vary amount of carbon dioxide incorporated depending on a desired mouthfeel, fizz and flavor.

In regard to claims 20-22 and 33-35, Suzuki et al discloses wine and fruit juice. Liu do not particularly disclose alcohol content of the resulting beverage. However, one of ordinary skill in the art would have been motivated to vary amount of alcohol in the beverage due to the consumer preference of alcohol product, and also based upon the concentration of the final preparation, materials, etc.

In regard to claims 14-16 and 30, that recite various foam-holding properties, it is noted that although the references do not specifically disclose every possible quantification or characteristic of its product, such as foam-holding properties, this characteristic would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary. The reference discloses the

same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would recognize that the foam-holding properties, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable reading of the teachings of the reference has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

Claims 17 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Suzuki et al (JP 04356160) in view of Gong Yungao (CN 1285153).

Suzuki et al is taken as cited above.

Suzuki et al do not disclose use of hop extract.

Gong Yungao disclose tea beverage "with medical health care" action containing hops and tea leaf extract. Gong Yungao discloses that the finished product prevents hypertension, regulates metabolism, and has a good taste.

Since Gong Yungao discloses tea beverage in combination with hops that prevents hypertension, regulates metabolism, and has a good taste, one of ordinary skill in the art would have been motivated to modify disclosure of Suzuki et al and to include ingredients (including hop extract) as taught by Gong Yungao for the benefits taught by Gong Yungao. One of ordinary skill in the art would have been motivated to do so, since both tea and hops are known to impart bitter flavor to beverages. One of ordinary skill in

the art would also have been motivated to do so, since hops were well known in the art to be used in preparation of effervescent beverages.

Response to Arguments

The rejection of claims 1, 5 and 12 under 35 U.S.C. 102(b) has been withdrawn due to the cancellation of claims 1-12.

Applicant's arguments filed 03/25/2008 have been fully considered but they are not persuasive. On pp.3-4 of the Remarks (see the reply to the office action mailed 10/25/2007), Applicants state that "the cited art did not appreciate that tea possessed foam-holding properties". In response to this argument, it is noted that composition comprising tea extract, foaming agents and carbon dioxide as recited in claims 13, 23 and 26, is a product which has been taught by both Liu and Suzuki. Since the prior art teaches of a composition that is substantially similar to the composition as claimed, it would have been obvious that the substantially similar composition would have substantially similar properties absent any clear and convincing evidence and/or arguments to the contrary.

On page 4 of the Remarks, Applicants state that "[Liu] reference does not suggest that the tea extract confers the unexpected property of foam holding". In response to this arguments see the answer to the arguments immediately above.

In response to Applicants' arguments that Liu does not teach the amounts of tea extract, Applicants are referred to the rejection as stated in the office action above.

In response to Applicants' arguments that combination of Gong with Suzuki and Gong with Liu fails to teach the foam-holding properties of the tea extract, it is noted that Gong is relied upon as a teaching of a combination of hops and tea leaf extract for the health benefits purpose such as prevention of hypertension, regulation of metabolism, and achievement of a good taste. Since Gong Yungao discloses tea beverage in combination with hops that prevents hypertension, regulates metabolism, and has a good taste, one of ordinary skill in the art would have been motivated to modify disclosure of Suzuki et al (or Liu) and to include ingredients (including hop extract) as taught by Gong Yungao for the benefits taught by Gong Yungao. One of ordinary skill in the art would have been motivated to do so, since both tea and hops are known to impart bitter flavor to beverages. One of ordinary skill in the art would also have been motivated to do so, since hops were well known in the art to be used in preparation of effervescent beverages.

On page 5 of the Remarks, Applicants state that "applicants to not add a fatty acid ester, the foam is naturally occurring due to the pouring of a carbonated beverage. The beverage of Suzuki is not carbonated. For at leas these reasons, Suzuki does not suggest the new claims". In response to this argument it is noted that, claims recite a beverage comprising carbon dioxide, foaming agent and tea leaf extract. Claims do not recite specific foaming agents, and do not exclude fatty acids from the composition. Regarding carbon dioxide recitations, it is noted that air contains carbon dioxide, and forcing composition to be mixed with air, is the same as forcing composition to be mixed with carbon dioxide.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VERA STULII whose telephone number is (571)272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

VS

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794